**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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| WILLIAM E. RUPP,<br><br>Claimant,<br><br>v.<br><br>TRUSSCRAFT, INC.,<br>Employer,<br><br>and<br><br>IDAHO STATE INSURANCE FUND,<br><br>Surety,<br><br>Defendants. | **IC 04-518419**<br><br>**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION**<br><br>Filed June 26, 2006 |

## INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Boise on December 12, 2005. Claimant, William E. Rupp, was present in person and represented by Darin G. Monroe of Boise. Defendant Employer, TrussCraft, Inc., and Defendant Surety, Idaho State Insurance Fund, were represented by Jon M. Bauman, of Boise. The parties presented oral and documentary evidence. This matter was then continued for the taking of post-hearing depositions, the submission of briefs, and subsequently came under advisement on April 6, 2006.

## ISSUE

The issue to be resolved is whether Defendants are liable for surgery of Claimant's left knee.

## ARGUMENTS OF THE PARTIES

Claimant suffered an industrial accident in 1998, for which he received workers' compensation benefits including a total left knee arthroplasty. He settled his 1998 claim. Claimant suffered another industrial accident on April 27, 2004, which he alleges resulted in the aggravation of his existing arthroplasty and accelerated the need for a revision of his total knee arthroplasty.

Defendants Employer and Surety contend that Claimant had a present and actual need for revision of his left knee arthroplasty prior to his April 27, 2004, industrial accident which thus did not accelerate his need for revision. Defendants also assert that Claimant is barred from receiving further workers' compensation benefits for his left knee by the lump sum settlement of his 1998 claim, particularly since the settlement expressly included an amount for future medical expenses and Claimant was apprised prior to settlement that his left knee arthroplasty would eventually require revision.

## EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at the December 12, 2005, hearing;
2. Claimant's Exhibits 1 through 5 admitted at the hearing;
3. Defendants Employer and Surety's Exhibits 1-17 admitted at the hearing;
4. The post-hearing deposition of Ronald M. Kristensen, M.D., taken by Claimant on January 16, 2006; and
5. The post-hearing deposition of Joseph Daines, M.D., taken by Defendants on January 18, 2006. Defendants' objection recorded at page 50 of the transcript of the deposition of Dr. Daines is sustained.

After having fully considered all of the above evidence, and the arguments of the parties, the Referee submits the following findings of fact and conclusions of law for review by the Commission.

## FINDINGS OF FACT

1. Claimant was 51 years old and had lived in Garden City for approximately ten years at the time of the hearing. Claimant has worked for Employer TrussCraft for 13 years. He started as a truck driver and was later promoted to floor manager.

2. In approximately 1980, Claimant suffered a left knee injury and underwent a partial meniscectomy. In 1992, Claimant twisted his left knee while hiking and was treated by an emergency room physician with anti-inflammatory medication and given an orthopedic referral. Claimant apparently did not follow through with the referral.

3. On June 5, 1998, Claimant suffered an accident while working for TrussCraft when he stepped off a forklift onto a block of wood and twisted his left knee and ankle. Claimant sought medical treatment and subsequently underwent arthroscopic meniscus repair on March 29, 1999, for extensive degenerative meniscus tearing. On April 12, 2000, Claimant underwent a second left knee arthroscopy which revealed arthritis and further degenerative changes, including a bone kissing lesion at the femoral condyle and the tibial plateau surface in the lateral compartment. Total left knee arthroplasty was recommended.

4. On October 3, 2000, orthopedic surgeon Ronald Kristensen, M.D., performed a total arthroplasty of Claimant's left knee. Claimant progressed well until approximately two months after surgery when he slipped on some ice and hyperextended his left knee, resulting in persistent increased symptoms. After recuperating from left knee arthroplasty, Claimant experienced ongoing

dull pain, and intermittent swelling and throbbing with overactivity. Dr. Kristensen placed permanent restrictions of no standing more than six hours per day, no climbing, and no repetitive lifting of more than 30 pounds. Claimant returned to modified work and took Ibuprofin when the pain increased with activity. He rated his pain as three to five on a scale of zero to ten.

5. Claimant settled his claim for his 1998 knee injury via a lump sum settlement agreement with TrussCraft and the State Insurance Fund. The settlement included an amount for future medical benefits for his left knee.

6. After recovering from his left knee arthroplasty, Claimant was promoted to the position of floor manager. He performed his duties well. Claimant then trained for several months to become a production manager with additional duties to hire and fire, complete orders, maintain inventories, and determine daily production schedules. Claimant's left knee arthroplasty gradually became increasingly symptomatic, however Claimant continued working.

7. On July 15, 2002, Claimant presented to Dr. Kristensen with lateral left knee pain. Dr. Kristensen referred Claimant to orthopedic surgeon Jeffry P. Menzner, M.D., for a second opinion.

8. On July 31, 2002, Claimant presented to Dr. Menzner who opined that the femoral implant of Claimant's left knee arthroplasty might be oversized and thus causing lateral knee pain. Dr. Menzner opined that should Claimant "choose not to accept his current functional level, possible revision of femoral and tibial components could be considered." Claimant's Exhibit 1, p. 000017. Claimant continued working. His pain was not overly limiting, although he had to moderate his work activities and could not overextend himself. He was able to participate in activities outside of work, including hunting and backpacking.

9. Claimant sought no medical treatment from August 2002 until February 2004.

10. On February 2, 2004, Claimant presented to Dr. Kristensen with left knee swelling and continued lateral left knee pain. Claimant's left knee pain was activity related and decreased with rest. Claimant continued performing his job functions and his extracurricular activities.

11. On April 23, 2004, Claimant presented again to Dr. Kristensen because of more left knee pain. Claimant rated his left knee pain at six or seven on a scale of one to ten. Dr. Kristensen restricted Claimant to working only six hours per day. Claimant continued working per Dr. Kristensen's recommendations.

12. On April 27, 2004, while at work for TrussCraft, Claimant yanked on the handle of a cart loaded with trusses. The cart's wheels were stuck in a crack. The handle came out abruptly and Claimant fell on his left side, striking his left knee. Claimant noted immediate intense left knee pain, which he rated as ten on a scale of one to ten. He filled out an accident report, which was signed by one of TrussCraft's owners, and continued working.

13. After the initial intense pain of the accident, Claimant's left knee pain moderated slightly, but remained greater than it had been prior to April 27. He rated his ongoing left knee pain at eight to nine, on a scale of one to ten. Claimant was no longer able to engage in extracurricular activities. He presented to the emergency room on June 22, 2004, with a large left knee joint effusion and was given prescription pain relievers by Brian Boesiger, M.D. In spite of this increased level of pain, Claimant continued working. Finally on August 11, 2004, Claimant ceased working due to his left knee pain. He has not been able to return to work since that time. On August 18, 2004, Claimant presented to Dr. Kristensen who released him from work retroactive to August 11, 2004.

14. Claimant testified at hearing that his increased knee pain is constant—no longer merely activity related—and has continued at an increased intensity since his April 2004 accident.

15. Having reviewed the record and observed Claimant at hearing, the Referee finds that Claimant is a credible witness.

## DISCUSSION AND FURTHER FINDINGS

16. **Entitlement to surgery.** The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996).

17. A claimant must provide medical testimony that supports a claim for compensation to a reasonable degree of medical probability. Langley v. State, Industrial Special Indemnity Fund, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as "having more evidence for than against." Fisher v. Bunker Hill Company, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magic words are not necessary to show a doctor's opinion was held to a reasonable degree of medical probability; only their plain and unequivocal testimony conveying a conviction that events are causally related. See, Jensen v. City of Pocatello, 135 Idaho 406, 412-13, 18 P.3d 211, 217 (2001).

18. Idaho Code § 72-432(1) mandates that an employer shall provide for an injured employee such reasonable medical, surgical or other attendance or treatment, nurse and hospital service, medicines, crutches, and apparatus, as may be reasonably required by the employee's physician or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter. Of course, the employer is only obligated to provide medical treatment necessitated by the industrial accident. The employer is not responsible for medical treatment not

related to the industrial accident. Williamson v. Whitman Corp./Pet, Inc., 130 Idaho 602, 944 P.2d 1365 (1997).

19. Claimant herein asserts that Defendants are responsible for his proposed left knee arthroplasty revision surgery noting: "An employer takes an employee as it finds him or her; a preexisting infirmity does not eliminate the opportunity for a worker's compensation claim provided the employment aggravated or accelerated the injury for which compensation is sought." Spivey v. Novartis Seed Inc., 137 Idaho 29, 34, 43 P.3d 788, 793 (2002), citing Wynn v. J. R. Simplot Co., 105 Idaho 102, 104, 666 P.2d 629, 631 (1983). In two Commission decisions, Van Sickle, 1987 IIC 0241, and Smith, 1989 IIC 0626, the Commission applied the axiom that if an industrial accident hastens the need for surgery, it is compensable.

20. In Van Sickle, claimant injured her knees in an industrial accident in December 1983. She underwent arthroscopic knee surgery in March 1984, and a total knee replacement in November 1985. The Commission found her claim compensable noting that while Van Sickle's pre-existing arthritis likely would have necessitated a total knee replacement at some future time, the industrial accident accelerated the progression of her arthritis and thus was the cause of her surgery at the time it was performed.

21. In Smith, claimant had a history of prior knee problems and treatment, including ligament and meniscus surgery. In February and May 1984, Smith reinjured his knee when he slipped while at work. In June 1984, Smith underwent a total knee replacement. Medical evidence established that his preexisting knee condition would have eventually required a total knee replacement at some future time, however, the Commission found Smith entitled to benefits for the total knee replacement surgery because the industrial accidents had exacerbated or aggravated his

knee condition thus requiring the replacement surgery in June 1984.

22. In the present case, orthopedic surgeon Joseph Daines, M.D., examined Claimant, reviewed his medical records, and testified that Claimant's April 2004 industrial accident did not accelerate his need for revision of his left knee arthroplasty. Instead, Dr. Daines testified that x-rays taken February 2, 2004, showed subtle changes consistent with osteolysis and loosening such that Claimant's arthroplasty needed revision prior to the industrial accident. However, when questioned by Claimant's counsel, Dr. Daines also testified that as a general principle he did not believe that a worker's compensation surety should be responsible for an entirely asymptomatic pre-existing condition rendered highly symptomatic by a work injury:

> Q. … I was interested in your example you were using about the patient who came to you with a history of no past knee pain until they had a twisting injury. I want to change that a little bit and just—What if they had a twisting injury at work and the objective findings show that this person has severe degenerative disease and now needs a total knee replacement? Would you say that the need for the total knee replacement was accelerated by the injury?
>
> A. No.
>
> Q. Okay.
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> A. The total knee is based on criteria of arthritis and erosion of the joint cartilage that was present before the injury.
>
> Q. Even if they had no—they had no symptoms prior to the accident.
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> A. That happens in Mr. Rupp's case when he came in the first time to get—to have his knee done. According to him he had no symptoms. He had an injury when he slipped on a block. He comes in and he has on an MRI scan a lot of arthritis. When he has his arthroscopy he has a lot of arthritis. It's the same analogy with that case.
> I would say that the arthritis was not related to his work injury, that that was present in his knee. The meniscus injury might be—It's the same thing. It's a little variance of the same thing. I'm not saying one thing for one person and another thing for another. These are things that I believe. And it doesn't

matter. And believe me. You know. If I'm the treating physician, you know, it's sometimes hard to maintain that because—you know. If I do a total knee I am going to be paid much more than I am for an arthroscopy. But I still do that because that's what I believe.

Q. So this hypothetical you don't believe that the work comp surety should pay for the total knee?

A. No.

Daines Deposition, p. 70, L. 16 through p. 72, L. 4.

23. According to Dr. Daines' belief, Defendants herein should not have been responsible for Claimant's original left knee arthroplasty, nor should the sureties have been responsible for benefits in Van Sickle, 1987 IIC 0241, Smith, 1989 IIC 0626, or Spivey v. Novartis Seed Inc., 137 Idaho 29, 43 P.3d 788 (2002), because each of these claimants had significant pre-existing degenerative conditions at the time of their industrial accidents. Dr. Daines' belief may be conceptually consistent with apportioning permanent impairment for pre-existing conditions, but it is contrary to determining responsibility for medical benefits in such circumstances under Idaho law. Dr. Daines' opinion that the need for total knee replacement was not accelerated by the work injury in the hypothetical scenario presented above calls into serious question his conclusion that Claimant's April 27, 2004, work injury herein did not accelerate his need for revision of his left knee arthroplasty. Medical experts are not expected to be legal experts. However, here a medical expert's testimony clearly reveals a personal belief contrary to well settled Idaho workers' compensation law on an issue highly material to his opinion. The Referee finds Dr. Daines' opinion unpersuasive.

24. Dr. Kristensen's opinion vacillated, but he ultimately concluded that Claimant's industrial accident accelerated and hastened his need for arthroplasty revision surgery. Dr.

Kristensen affirmed that Claimant had arthritic changes present for many years prior to his April 27, 2004, accident. However, on April 23, 2004, just four days before the industrial accident, Dr. Kristensen examined Claimant and recorded: "He is aware that he may be a candidate for a revision. Nevertheless, I would recommend that he stay with this knee until his symptoms are quite limiting." Claimant's Exhibit 1, p. 000013 (emphasis supplied). Thus, although Claimant's need for revision of his total left knee arthroplasty was objectively documented by x-rays prior to his 2004 industrial accident, his subjective symptoms were not sufficiently limiting as to require the revision prior to his 2004 accident. This is further established by the fact that Dr. Kristensen did not take Claimant off work on April 24, 2004. Rather, he imposed restrictions of six hours per day and allowed Claimant to continue working. Dr. Kristensen did not take Claimant off work until August 11, 2004. While objective evidence would have justified arthroplasty revision prior to the 2004 work accident, Claimant was still able to tolerate his subjective symptoms until after his April 27, 2004 work accident.

25. Claimant testified to the worsening of his left knee symptoms after his 2004 industrial accident. Claimant's history and consistent reports of worsened left knee symptoms are a critical part of the foundation for Dr. Kristensen's opinion regarding acceleration. Claimant reported activity related left knee pain prior to his 2004 work accident, but constant knee pain thereafter. His reports of worsened symptoms have been consistent and are credible. Dr. Kristensen's ultimate conclusion is consistent with Claimant's demonstrated functioning and the radiographic evidence and is persuasive.

26. Defendants assert this case is essentially indistinguishable from the Commission's decision in Losee v. GCX Express, Inc., filed March 15, 2006. Objective radiographic evidence in

the present case and in Losee showed no difference before and after the industrial accidents. However, as noted in Losee, objective radiographic evidence need not be present to prove a compensable injury or aggravation. Critically, Losee's accounts of increased symptoms arising from his industrial accident were inconsistent and hence not accorded credibility, as distinguished from his pre-injury symptoms. In contrast, in the present case Claimant's reports of worsened subjective complaints at the time of his 2004 industrial accident to different medical providers are consistent and credible. The point of Losee is that while an employer takes an employee as he finds him, if the employee is already in present and actual need of specific medical treatment immediately prior to the industrial accident, and reliable evidence does not demonstrate that the industrial accident aggravated or hastened the need for the specific medical treatment sought, then the need for medical treatment does not arise from the industrial accident.

27. In the present case, Claimant's symptomatic but tolerable left knee condition became debilitating by reason of his 2004 work accident. Claimant has sustained his burden of proving that the present need for revision of his left knee arthroplasty was accelerated by his 2004 industrial accident.

28. **The 2003 Lump Sum Settlement Agreement**. Defendants assert that Claimant's 2003 Lump Sum Settlement Agreement bars his present claim for workers' compensation benefits for his left knee. The 2003 Agreement expressly included an amount of $5,835.37 as future medical benefits. There is no dispute that Claimant was apprised prior to executing the Agreement that his left knee arthroplasty would eventually require revision. Absent a new accident, the 2003 Lump Sum Agreement would certainly bar Claimant's present request for medical benefits for his left knee. However, the 2004 accident is a new accident which accelerated and hastened his need for

arthroplasty revision. This constitutes a new claim arising April 27, 2004.

29. Defendants assert that the 2003 Agreement extends to all future medical benefits relating to Claimant's left knee. Such a characterization is overly broad. The 2003 Agreement specifically references Claimant's industrial accidents and injuries by the dates of September 30, 1992, October 31, 1992, October 22, 1993, September 12, 1995, and his initial industrial left knee injury of June 5, 1998. The Agreement cites the controversy between Claimant and Defendants surrounding those specific accidents and then provides in pertinent part:

> There are genuine and substantial disputes and differences between the parties as to the degree, if any, of Claimant's impairment and disability, the need for retraining benefits and the need for future medical benefits. The parties, however, wish to settle their differences on a full and final basis advising the Commission that it is in the best interests of the parties to do so. Therefore, as provided by Idaho Code Section 72-404, in an effort to settle this disputed matter, the Surety tenders to the Claimant and the Claimant accepts the sum of $25,000.00 in full and final settlement of any and all claims he has or may have as a result of any of the alleged injuries described herein.

Defendants' Exhibit 13, p. 6 (emphasis supplied). The Agreement further provides:

> The parties acknowledge that the nature and extent of the temporary disability and permanent partial disability and medical and related expenses in this matter are uncertain and may be continuing and may substantially exceed those hereinabove set forth, and the above shall not limit the scope of this Agreement or the Order of Discharge entered by the Commission pursuant hereto, both which contemplate and include all rights and claims to all permanent and temporary disability benefits, all impairment benefits and all medical and related benefits whether or not known, herein listed, discoverable or contemplated by the parties.
>
> The Claimant does agree to indemnify, defend and hold Defendants harmless from and against any further claim or loss of any and every kind arising out of or related to the said alleged accident, and any resultant losses, damages or injuries, including without limit, any claim respecting past or future hospital, medical or like expenses.
>
> SEVENTH: The Claimant acknowledges and agrees that he has carefully read this instrument in its entirety and has been fully advised regarding the contents of this Agreement by his counsel, that Claimant understands its contents and has signed same knowing that the payment forever concludes, settles and fully disposes of any and all claims of any kind and nature and character that he now has or may have individually against Employer and Surety

> on account of the alleged injuries and that these proceedings are concluded and forever discharged and that they may be dismissed with prejudice by reason hereof, subject only to the Commission's order and approval.
>
> EIGHTH: Upon the Commission's order approving this Agreement and subject to the payment of $25,000.00, the balance due Claimant, the Employer and Surety shall be discharged and released of and from any and all liability on account of the above-described accidents and injuries.

Defendants' Exhibit 13, pp. 9-10 (emphasis supplied).

30. As the Agreement language emphasized above repeatedly declares, the Agreement resolves the specific claims then at issue between Claimant and Defendants, specifically, matters pertaining to the Claimant's 1998 accident, and prior accidents. It does not address or preclude subsequent claims, including those arising from then future accidents, such as Claimant's April 27, 2004, accident. The 2003 Agreement does not bar Claimant's present claims herein. Construing the 2003 Agreement to bar workers' compensation claims for injuries arising from future industrial accidents, including those to Claimant's left knee, would violate the plain language of the 2003 Agreement itself and also fly in the face of Idaho Code § 72-318(2) which invalidates any agreement by an employee to waive his rights to workers' compensation benefits for future injuries even with the same employer. See e.g. Emery v. J.R. Simplot Co., 141 Idaho 407, 410, 111 P.3d 92, 95 (2005).

31. To hold that benefits for a subsequent new accident damaging a body part previously injured may be precluded by settlement of a claim from a prior accident, would effectively deny workers' compensation benefits for all injuries except the first to each body part. The impact of such a holding would be far reaching as experience shows that multiple industrial injuries to the same body part, such as the low back, over a worker's lifetime, are not uncommon.

32. **Res Judicata and Collateral Estoppel**. Defendants next assert that res judicata and collateral estoppel bar Claimant's present claim for worker's compensation benefits for his left knee.

Defendants cite Harmon v. Lute's Construction Co, Inc., 112 Idaho 291, 732 P.2d 260 (1986), Jackman v. Industrial special Indemnity Fund, 129 Idaho 689, 931 P.2d 1207 (1997), and Powder Basin Psychiatric Associates, Inc., v. Ullrich, 129 Idaho 658, 931 P.2d 652 (Ct.App. 1996), to support their contention that Claimant herein is barred from seeking further medical benefits for his left knee. All of these cited decisions arise from attempts to set aside, expand upon, or relitigate a determination, absent a new accident or new cause of action. None address the circumstance of a subsequent new accident giving rise to a new claim or cause of action.

33. Claimant's April 27, 2004, accident aggravated his preexisting condition and accelerated his need for arthroplasty revision. This constitutes a new accident and injury giving rise to a new claim which did not exist prior to April 2004. Claimant's entitlement to medical benefits for his left knee due to his June 1998 industrial accident has been resolved via the 2003 Lump Sum Agreement. However, Claimant's entitlement to medical benefits for his left knee due to his April 27, 2004, industrial accident has not heretofore been litigated or resolved. Issues not ripe for adjudication in a prior proceeding are not barred by res judicata in a later proceeding. Bell Rapids Mutual Irrigation Company v. Hausner, 126 Idaho 752, 753, 890 P.2d 338, 339 (1995). Furthermore, only issues actually decided in proceedings before the Industrial Commission may be barred by collateral estoppel. Jackman v. Industrial Special Indemnity Fund, 129 Idaho 689, 931 P.2d 1207 (1997).

34. **Credit**. Defendants request that they at least be given credit for $5,835.37, the amount of future medical benefits provided by the 2003 Lump Sum Agreement. As noted above, the 2003 Agreement pertained to and resolved only claims arising from accidents prior to and including June 5, 1998. It does not apply to claims for benefits arising from subsequent accidents and provides

no basis to reduce benefits due Claimant as a result of a new accident in 2004.

## CONCLUSIONS OF LAW

1. Claimant has proven that he is entitled to left knee revision surgery due to his April 27, 2004, industrial accident.
2. Claimant's claim is not foreclosed by his 2003 Lump Sum Settlement Agreement or barred by res judicata or collateral estoppel.
3. Defendants are not entitled to a credit for future medical benefits paid pursuant to the 2003 Lump Sum Settlement Agreement.

## RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing Findings of Fact and Conclusions of Law as its own, and issue an appropriate final order.

DATED this _19th_ day of June, 2006.

INDUSTRIAL COMMISSION

/s/_____
Alan Reed Taylor, Referee

ATTEST:

/s/_____
Assistant Commission Secretary

## CERTIFICATE OF SERVICE

I hereby certify that on the __26th__ day of __June_____, 2006, a true and correct copy of **Findings of Fact, Conclusions of Law, and Recommendation** was served by regular United States Mail upon each of the following:

DARIN G MONROE
PO BOX 50313
BOISE ID 83705

JON M BAUMAN
PO BOX 1539
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kr /s/_____